

Respondent and CGU Hawkeye Security (CGU) contend claimant aggravated his back condition in May 2003 and since Fidelity was the carrier on the risk at that time, and still is, Fidelity is responsible for providing claimant with the additional medical treatment

ordered by Judge Fuller. CGU provided coverage for respondent from September 1, 2000, through August 31, 2001.

Respondent and Liberty Mutual Insurance Company (Liberty) advised the Board in a June 7, 2004 letter they would not be filing a brief for this appeal. In their letter to Judge Fuller dated March 1, 2004, respondent and Liberty contend claimant was injured in a single traumatic incident on February 12, 2001, which was outside of Liberty's coverage period of September 1, 2001, through August 31, 2002. Respondent and Liberty noted if claimant suffered an aggravation of his injury on May 26, 2003, Liberty was not providing respondent coverage at that time and, therefore, would have no liability.

Claimant contends this appeal is primarily a fight among the various insurance carriers as to which is responsible for the medical treatment ordered by Judge Fuller. Claimant has no particular argument as to which of the insurance carriers is responsible.

The only issue before the Board on this appeal is whether claimant injured or aggravated his back while working for respondent.¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes:

Claimant began working for respondent in 1990 and performed cooler maintenance work in one area of respondent's plant. Claimant has a history of back problems while working for respondent, including incidents on approximately May 14, 1992; October 9, 1993; and November 21, 1994. There is very little testimony regarding the May 1992 and November 1994 incidents, but the record indicates those incidents resulted from repetitive motion. Likewise, there is little testimony regarding the October 9, 1993 incident, but it appears claimant pulled up on a freezer door on or about that date. That incident affected claimant's low back and legs. Claimant reported these incidents to respondent. As part of the treatment for his back problems, claimant underwent an MRI, which revealed a herniated disc at the L5-S1 level. Doctors who saw claimant for his back problems recommended that claimant have back surgery, but claimant chose to receive conservative treatment, which included physical therapy and medication. Despite treatment, claimant continued to have back pain.

¹ Although respondent and Fidelity raise timely notice of accident as an issue for purposes of this appeal, they did not raise that issue to Judge Fuller. See respondent and Fidelity's April 30, 2004 letter to Judge Fuller.

Claimant left respondent's employ in 1995 and began working for another employer as a meat inspector. In February 2000, claimant returned to work for respondent. Upon his return, claimant passed a preemployment physical and worked as a welder throughout the plant. Claimant reported more back problems, specifically incidents in February 2001 and May 2003, while working for respondent. On February 12, 2001, claimant slipped on ice when lifting a guardrail onto a fork lift and experienced a catch in his low back along with symptoms in his legs. After seeing a doctor and receiving treatment in the form of physical therapy and medication, claimant began seeing Dr. J. E. Harrington on May 22, 2001. In the course of the treatment provided by Dr. Harrington, claimant was placed on medication and underwent another MRI. A lumbar epidural steroid injection was performed in October 2001, which provided limited relief to claimant. Dr. Harrington released claimant on April 23, 2002. After the February 2001 incident, claimant continued to perform his regular job and at times modified his job somewhat as he had been given restrictions. After his release from Dr. Harrington's care in April 2002, claimant performed his regular job duties.

On May 26, 2003, while working for respondent claimant was walking in a squatted position to get under a piece of equipment when he felt sudden pain in his low back. Claimant immediately reported this incident to respondent's nursing department and was referred to Dr. Yeats. Claimant saw Dr. Yeats on two occasions after the May 2003 incident. Between the April 2002 release and the May 2003 incident, claimant reported episodes of discomfort to respondent's nursing department and would receive ice and ibuprofen. Claimant was performing his regular job at the time of his November 2003 deposition while continuing to have back pain and take medications prescribed by Dr. Yeats. Also at that time, claimant was wearing a low back support as recommended by Dr. Yeats.

At respondent's request, Dr. Harrington examined claimant on March 16, 2004, and diagnosed a herniated nucleus pulposus at L5-S1 and degenerative disc disease at L4-5 and L5-S1. Dr. Harrington recommended continued conservative treatment for claimant's degenerative disc disease and resuming claimant's previous medications, which the doctor noted had expired and were not able to be refilled because of the insurance company's refusal. While Dr. Harrington stated claimant's deterioration could be due to the cessation of his medication and that claimant was the same as when he was dismissed from care, the doctor concluded that claimant's condition was due to progressive osteoarthritis and chronic aggravation due to his work activities.

Dr. Harrington did not specifically comment upon whether claimant's present symptoms resulted from either a single traumatic event or from an ongoing series of repetitive traumas. Dr. Pedro Murati, who saw claimant in November 2003 and diagnosed claimant with low back pain secondary to a herniated disc, indicated claimant's current diagnosis was a direct result of the work-related injury while employed by respondent. But

Dr. Murati did not specifically comment upon whether claimant's present symptoms were from a single event or from a series of repetitive traumas.

The Board finds and concludes it is more probably true than not that claimant aggravated his back condition while working for respondent. Claimant testified he has had back problems since the 1992 or 1993 incident, with less pain when he was not working for respondent from 1995 to 2000. Claimant denies seeking any medical treatment as a result of any work-related accident or injury while employed as a meat inspector. In addition to receiving treatment for his back while working for respondent, claimant has taken over-the-counter medication for his back problems over the years. With regard to the May 26, 2003 incident, claimant experienced low back pain while performing his work duties for respondent on that date; received treatment, including prescription medication, after that incident; was wearing a low back support, as recommended by Dr. Yeats, at the time of his November 2003 deposition; and continued to experience back problems when seen by Dr. Harrington in March 2004. As noted above, in March 2004 Dr. Harrington stated claimant's condition was due to progressive osteoarthritis and chronic aggravation due to his work activities. Claimant aggravated his back condition while working for respondent and, therefore, he is entitled to receive workers compensation benefits.

Respondent and Fidelity contend claimant did not provide timely notice of an accident occurring during Fidelity's coverage period. As that issue was not raised before the Judge, the Board may not review it at this time.² Nonetheless, claimant testified he promptly reported the various incidents noted here to his supervisors and/or respondent's nursing department. Regarding the May 26, 2003 incident, claimant also testified he went to respondent's nursing department to report the accident and to seek a referral to a doctor. On May 28, 2003, claimant first saw Dr. Yeats. Claimant's testimony with respect to providing notice to respondent is uncontradicted.

As claimant aggravated his back while working for respondent, respondent is responsible for providing the additional medical treatment ordered by Judge Fuller. Moreover, the Judge determined Fidelity was responsible for providing that medical treatment, which is a finding that the Board does not have jurisdiction to review at this juncture of the claim.³

² See K.S.A. 44-555c(a), which provides that review by the Board shall be upon questions of law and fact as presented to the administrative law judge.

³ See K.S.A. 44-534a(a)(2).

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing of the claim.⁴

WHEREFORE, the Board affirms the May 3, 2004 preliminary hearing Order entered by Judge Fuller.

IT IS SO ORDERED.

Dated this ____ day of July 2004.

BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent and CGU
Terry J. Malone, Attorney for Respondent and Liberty
Shirla R. McQueen, Attorney for Respondent and Fidelity
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁴ *Id.*